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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 759

ERNEST L. LEVINE,

Petitioner,

vs.

DAVID H. BERMAN AND DOROTHY BERMAN, CO-PARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF DAVID H. BERMAN CO.,

Respondents.

PETITION AND BRIEF IN SUPPORT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

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ERNEST L. LEVINE,

Petitioner,

vs.

DAVID H. BERMAN AND DOROTHY BERMAN, Co-Partners, Doing Business Under the Firm Name and Style of David H. Berman Co.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the United States:

Petitioner, Ernest L. Levine, petitions this court for the issuance of a Writ of Certiorari to the United States Court of Appeals for the 7th Circuit to review its judgment of December 19, 1949, affirming the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division, to the end that its judgment be reversed with directions to reverse the judgment of the court below.

SUMMARY OF THE MATTER INVOLVED.

Petitioner, a veteran, sued respondents, his employers, on January 31, 1946, for restoration to his pre-war position and for compensation from the date of the demand, December 18, 1945, pursuant to the Selective Training and Service Act of 1940, as amended (50 U. S. C. A. App. § 308). He appealed from an adverse decision and obtained a reversal with directions to make conclusions of law not inconsistent with the opinion (161 F. 2d 386). During the pendency of the appeal, and prior to the entry of the order of restoration on December 23, 1947, Petitioner obtained other employment and asked for a money judgment for the loss sustained by him from December 18, 1945, to December 23, 1947, less credit for his earnings during that period. The matter was heard by a Master in Chancery who concluded that Petitioner was not entitled to $41,696.55 which he claimed but only to $4,725, but that even this amount should not be allowed because of alleged inequitable conduct. His findings and recommendations were adopted by the District Court and were affirmed by the Court of Appeals (178 F. (2) 440). The Petition seeks to review the decision on the second appeal.

QUESTIONS PRESENTED.

1. Whether courts are authorized pursuant to the Selective Training and Service Act of 1940 (50 U. S. C. App. 308e) to deny in their discretion compensatory damages to a veteran who has been wrongfully and unlawfully denied re-employment.

2. Whether the decision of the Court of Appeals upon the first appeal (161 F. (2d) 386) and the subsequent District Court judgment (Tr. 29, 30) which "impliedly at least" found that petitioner applied for re-employment in good faith and therefore that respondents wrongfully and unlawfully refused to re-employ him, can be relitigated or whether respondents are bound by such former determination.

3. Whether the findings of lack of good faith, perjury and fraud on the part of petitioner who acted upon the advice of the Veterans Administration and the United States Attorney, have any factual basis in the evidence adduced at the hearing herein.

4. Whether the findings of the Master which were adopted by the trial court and by the court of appeals were clearly erroneous so as to require a reversal of the judgment.

5. Whether the maxim of equity that one who comes into equity must come with clean hands is applicable to the statutory proceedings under the Selective Training and Service Act.

6. Whether the decision on the first appeal and the judgment entered pursuant to the mandate that Petitioner was entitled to a restoration on the basis of 10% commission was binding on the trial court and the Court of Appeals so that there was due to the Petitioner in damages after allowing all credits to the respondents the sum of $41,696.55.

REASONS FOR THE ALLOWANCE OF THE WRIT.

This writ of certiorari is sought because the issues presented herein raise important questions of federal law.

1. The effect of the decision below is that petitioner, a veteran, has been denied relief notwithstanding the fact that he was unlawfully denied re-employment and suffered damage. The Circuit Court ruled that under such circumstances, the District Court nevertheless had discretion to deny compensatory damages for good cause. If, as concluded by the court below, a veteran may be wrongfully kept out of his job, as here, for two years, and the court may in its discretion, award no damages (Tr. 245), then, there may be an injury and damage, without a remedy. Whether Congress intended such a situation to prevail with regard to a returning serviceman is a question which should be decided by the Supreme Court. There is no dispute that petitioner could not find employmnt during December, 1945, nor could he find employment at a comparable salary before June 1, 1947. It is therefore evident that he was damaged by the wrongful conduct of respondents.

2. The courts are not in accord as to the meaning of the words "shall have power" in the Act. The Writ should be issued to settle the important question involving the rights of veterans for whose benefit the Act was created.

3. Instead of rewarding the veteran for the service which he rendered to his country, the stigma of perjury, falsity, deceit, fraud, bad faith, and "unclean hands" was permanently stamped upon him by the findings of the Master which were adopted in the published opinion and which findings have no support in the evidence and are

clearly erroneous. The Writ should be issued to remove the stigma which is based on findings which have no support in the record.

4. The decision on the former appeal was not only conclusive on the trial court but also on the court of appeals, and while it is conceded that this was the rule, and that its former decision may only be reconciled with a determination of good faith on the part of Petitioner, it nevertheless concluded that the trial court was justified to retry the issues from the beginning and reach a different result. Such a decision is not in harmony with the established law.

5. The conception of the master and trial court which adopted his report and of the Court of Appeals which confirmed the judgment below, that even when a veteran had established that he is entitled to recover $4,725.00 because of the refusal of his employer to restore him to his position in violation of the Act as found on the prior appeal, he was nevertheless not entitled to recover it because of alleged misconduct as a witness, finds no support in law. If Petitioner perjured himself (which we will show later not to be the fact) the remedy was to hold him for perjury but not to deny his right to compensation, and the opinion is contrary to the views expressed on the prior appeal.

6. The precedent established in this case that the denial by claimant of the testimony of certain witnesses as to alleged conversations with him constitutes perjury and that such perjury forfeits his claim *in toto,* even to the amount of the claim which is established by the admitted facts, is fraught with danger. Such a decision will prevent parties from denying alleged conversations for fear that they will be called perjurers and have their action denied *in toto* even to the amount which may not be in dispute, and thereby the defendants will be in a position to

urge that the failure to deny the testimony constituted an admission. Such a course of procedure is contrary to the elementary rules of trial and procedure and ought not to be allowed to stand as the law, and the Writ should be issued to reverse such a precedence.

PRAYER FOR RELIEF.

Petitioner, therefore, prays that this court may exercise its discretion to grant the Writ of Certiorari directed to the United States Court of Appeals for the 7th Circuit to the end that its judgment of December 19, 1949, may be reviewed and reversed with directions to set aside the judgment below and for such other orders as it may deem proper.

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BRIEF IN SUPPORT OF PETITION.

JURISDICTION INVOKED.

The jurisdiction of this court is invoked under § 1254 of the Judiciary Act of 1948 (28 U. S. C. A. § 1254). The judgment was entered December 19, 1949, and the time to file the Petition was extended here to April 17, 1950, pursuant to § 2101(c) (28 U. S. C. A. § 2101).

OPINIONS BELOW.

The opinion on the first appeal is fully reported (161 F. (2) 386) and certiorari was denied here (333 U. S. 792). The opinion in the instant appeal appears in this record (Tr. 240) and is also published (178 F. 2d 440).

STATUTES INVOLVED.

50 U. S. C. App. 308 (b)(B) provides for the restoration of an honorably discharged veteran to his former employment where he is still qualified to perform the duties of his position and where he makes application for re-employment within ninety days:

> "(B) * * * if such position was in the employ of a private employer, such employer shall restore such person to such position, or to a position of like seniority status, and pay unless the employee's circumstances have so changed as to make it impossible or unreasonable to do so;"

50 U. S. C. App. 308(e) provides:

> "In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the persons entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action."

STATEMENT.

This petition reflects the extraordinary difficulties experienced by an honorably discharged veteran who sought re-employment with a firm which refused to follow its legal and moral obligations under the Selective Training and Service Act of 1940.

Petitioner was in the employ of respondents in 1942 when he was inducted into the Armed Forces of the United States. Upon his honorable discharge on December 18, 1945, he applied for re-employment (Tr. 41-42). Respondents refused to re-employ petitioner in the position he held prior to his entry into service (Tr. 29, Finding IV). On January 31, 1946, a complaint was filed herein on petitioner's behalf by the United States Attorney for the Northern District of Illinois charging a violation of 50 U. S. C. App. 308(a) (b) and (c). The complaint was dismissed on May 8, 1946, by the lower court on the theory that it was impossible to return petitioner to his former position because of changes in respondent's business (Tr. 2, 3, 28). On appeal, the Circuit Court of Appeals reversed and on May 6, 1947, directed the District Court "to restate its conclusions of law in accordance with the opinion of this Court" (Tr. 2). In this opinion, reported at 161 F. (2d) 386 (cert. denied 333 U. S. 792) Judge Minton stated:

> "The petitioner was offered a territory, not his old territory. He was not offered his old commission of ten percent but was offered in one instance seven and one half percent to sell 'Tumble Twist' rugs in a territory, and in another instance he was offered merchandise, what kind does not appear, in a territory at seven and one half per cent. Such offers as to territory and commission do not square with his status

and pay before he entered the service and do not satisfy the statute."

Upon remand, the District Court found that respondents had made insufficient and improper offers of re-employment on December 18, 1945, and January 25, 1946, in violation of 50 U. S. C. App. 308 (a) (b) and (c). The District Court entered a judgment on December 23, 1947, directing restoration of petitioner to his former position at a commission of 10 per cent (Tr. 29, 30).

Thereafter, in December, 1947, respondents offered to restore petitioner to his former position but this offer was refused on advice from the United States Attorney because after two years of litigation with his former employer, petitioner no longer believed such job would be secure for more than a year and he then had a fine job elsewhere (Tr. 70-72).

On February 10, 1948, the cause was referred to a master to consider all issues "remaining undetermined in this cause" (Tr. 31) in order to decide whether petitioner was entitled to any damages (Tr. 53-54).

The master found:

1. That petitioner was not gainfully employed from the date of his request for re-employment (December 18, 1945) to July 1, 1946 (Finding 6, Tr. 43).

2. That he has had satisfactory employment with another concern since June 20, 1947 (Finding 7, Tr. 43).

3. That he refused to accept re-employment at a commission of 7½ percent (although the Circuit and District Court orders require 10 percent) and that his refusal was "apparently not in good faith" (Finding 8, Tr. 43-44).

4. That he improperly refused to accept re-employment on January 1, 1946, because he wanted a cash settlement from respondents (Finding 9, Tr. 44. The District Court had ruled that respondent's offer of re-

employment on January 25, 1946, was in violation of 50 U. S. C. App. 308 (Finding III, IV, Tr. 29)).

5. That he refused employment elsewhere between January 1, 1946 and July 1, 1946. (Finding 11, Tr. 44. There is no factual support for this in the record.)

6. That the application for the order of restoration, which was submitted by the United States Attorney for the Northern District of Illinois was a fraud on the District Court. (Finding 14, Tr. 45; Objections by United States Attorney No. 9, *et seq.* Tr. 218-219.)

On the basis of these findings the District Court entered an order denying any damages to petitioner (Tr. 225). On appeal, the Circuit Court of Appeals ruled (178 F. (2d) 440):

> "While the question of petitioner's good faith apparently was not raised or discussed in our previous opinion, we suppose our holding might be construed to find good faith, impliedly as least; however, we know of no reason why in the instant proceeding the master, in view of subsequent events, might not find that he was lacking in good faith from the beginning.
>
> * * * * *
>
> "Congress has laid down no yardstick by which to measure the damages recoverable by a person who has been wrongfully refused restoration to this former position. * * * If the court has the discretionary power, as we think it has, to determine the amount of the allowance, it would seem to follow that it has such power to deny such allowance *in toto* for good and sufficient cause."

The important question of federal law involved herein which has not been, and should be decided by the Supreme Court is whether 50 U. S. C. App. 308(e) grants discretion to the courts to withhold the grant of damages or whether damages, once established, must be paid to the veteran wrongfully denied re-employment. As noted by

the United States Attorney and counsel for respondent, there are approximately two hundred cases involving the propriety of granting compensatory damages to veterans under this section of the law (Tr. 191, 199).

Some of the lower court cases involving construction of 50 U. S. C. App. 308(e) are:

Lee v. *Remington Rand, Inc.*, 68 F. Supp. 837.
Dacey v. *Trust Fund, Inc.*, 66 F. Supp. 321-323.
Stalter v. *Becker Roofing Co.*, 65 F. Supp. 633.
Flore v. *North Shore Bus Co.*, 161 F. (2d) 552.
Whitver v. *Aalfs-Baker Mfg. Co.*, 67 F. Supp. 524.
Kay v. *General Cable Corp.*, 59 F. Supp. 358.
Hall v. *Union Light & Heat & Power Co.*, 53 F. Supp. 817.
Doane Co. v. *Martin*, 164 F. (2d) 537.
Bentubo v. *Boston and Maine Railroad*, 160 F. (2d) 326.
Van Doren v. Van Doren Laundry, 68 F. Supp. 938.
Tsang v. *Kan*, 173 F. (2d) 204.
O'Connor v. *Yardley Golf Club*, 79 F. Supp. 264.
Flynn, et al. v. *Ward Leonard Electric Co.*, 84 F. Supp. 399.

The issue presented herein, therefore, affects a large number of veterans and it is one which has not been and should be settled by the Supreme Court.

The decision below is in conflict with decisions of this court as to the effect which must be given to a prior judgment between the same parties. The first decision of the Circuit Court herein "impliedly at least" found that petitioner sought re-employment in good faith (Tr. 243). The District Court thereafter entered a judgment (Tr. 28-30) finding that respondents' offers of re-employment were insufficient and that they violated the statute. If

petitioner acted in bad faith in seeking re-employment, respondents were not required to rehire him and were guilty of no violation.

The first decision of the Circuit Court and the findings of a violation of 50 U. S. C. App. 308 on the part of respondents became the law of the case and *res judicata*. To permit reopening of issues which either were previously litigated or which could have been litigated at the first hearing of the cause herein would be a license for endless litigation in violation of the mandate of the Supreme Court expressed in

Cromwell v. *County of Sac*, 94 U. S. 351 (1876).
Baltimore SS Co. v. *Philips*, 274 U. S. 316 (1927).
Tait v. *Western Maryland Ry. Co.*, 289 U. S. 620 (1933).
Sunshine Coal Co. v. *Adkins*, 310 U. S. 381 (1940).

Because of the conflict with these Supreme Court decisions, certiorari should be granted.

ARGUMENT.

I.

The Writ Should Issue to Settle the Construction of the Words "Shall Have Power," Employed in 50 U. S. C. App. 308e, Whether It Was Mandatory or Discretionary, and Whether the Discretion May Be Exercised in Denying Any Compensation When It Was Admitted That There Was Due to the Petitioner at Least $4,725.

The Master found (Tr. 48; Finding 8) that on the basis of 7½% commission and a deduction of 40% for travelling expenses, there was due to the Petitioner $4,725.00. He then concluded (Tr. 49; Par. 10) that Petitioner's application for compensation was "tainted with deceit and bad faith", and that under the "equitable maxim" that he who comes into equity must come with clean hands, the Petitioner was not entitled to any relief.* His findings and conclusions were adopted by the court and affirmed by the Court of Appeals.

Assuming *arguendo* that the Petitioner was guilty of "deceit" and "bad faith" and that the equitable maxim applied (which we will later show to the contrary) yet if the words "shall have power" be held to be *mandatory,* when the loss is *conceded,* Petitioner would still be entitled to *recover the amount admitted to be due him.* Even if the words be construed as "discretionary" the discretion could not be exercised in the sense that a court may deny the amount which is established by the evidence to be due, because of other equitable considerations.

* He completely overlooked that this was not an equitable proceeding but a statutory proceeding, and that Petitioner did not come into equity but in a court of law.

The opinion cites (Tr. 245) the decision in the *Boston* case (160 F. 2d 326) where these words were held to be "discretionary". However, the discretion there was used in the sense of *mitigating* the damages, but *not in the sense* of denying compensation *in toto* when it was *conceded* that the loss was sustained in a specific amount.

The District Court in the *Van Doren* case (68 Fed. Supp. 938) held that these words were discretionary even to the extent of denying total compensation. In *reversing* this case, the Court of Appeals for the Third Circuit (162 F. (2) 1007) expressed *great doubt* whether these words were "discretionary". In reversing the decision below on the ground that even if these words were discretionary, it could not be exercised as to deny the entire compensation, the court said (p. 1010):

> "Petitioner urges that compensation for loss of wages is made mandatory by 50 U. S. C. A. Appendix, § 308 (e); but that, even if the granting of compensation is discretionary, the failure to do so in the instant case was an abuse of discretion.
>
> Examination of the legislative history of the compensation provision *does not leave us free from doubt as to what the lawmakers intended.* The provision was originally introduced by Senator Wagner in the form of a floor amendment to the then pending Selective Training and Service Act of 1940. Senator Wagner explained to the upper chamber that the amendment was designed to grant, to the ex-serviceman suing for reinstatement, those wages lost during the interval between his application for reemployment and the judicial determination.[1] Representative

1. Pertinent excerpts from the discussion on the floor of the Senate are quoted herewith:

Mr. Wagner, 86 Cong. Rec. p. 10925:

"The reason why I suggest that amendment is that while there is a provision in the bill making the United States district court available to the individual for reinstatement if the employer refuses to reinstate him, if there should be a delay, say, of a month or 6 weeks and the individual should receive

Healey, who later introduced an identical amendment on the floor of the House of Representatives, *stressed that reinstatement should necessarily be accompanied by the awarding of wages lost or damages suffered by the applicant.*[2] Both legislative bodies approved of the amendment with a minimum of debate.

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judgment of reinstatement, there is no provision in the bill for the payment of wages during the period the action was pending and the individual was out of employment. It seems to me the wages ought to begin from the time the application for reinstatement is made providing the application is upheld by the court."

Id. at p. 11031: "We now provide under the bill, in the case of one who has served under the draft and has ended his service and seeks reemployment in his former position, that in the event the employer refuses to reemploy the individual he then may petition the court for reinstatement, and then the court of course must proceed by hearing, and reach a determination. It may happen that a period of 1 or 2 or 3 months will elapse before the court enters its judgment. In the meantime, if the employee is found by the court to be entitled to return to his position, he has been out of employment for a period of 1 to 3 months, and no authority is given the court to give him judgment for back pay during that period. The amendment simply provides that in addition to entering judgment finding that the employer has violated the law and that the individual is entitled to reemployment, the court may also order that he shall receive back pay for lost wages due to the violation of the law."

2. Mr. Healey's remarks were as follows:

"Mr. Chairman, this amendment merely gives the courts, after a decision has been reached in favor of the applicant for relief from failure to reinstate, power to assess as damages the loss of wages suffered by such applicant from the time he applies for reinstatement up to the time that the court finds that such reinstatement is justified on the facts and circumstances of the case. You have held out to these men you are going to induct into service that you will restore them insofar as you have the power to restore them to their status quo before they were inducted into the service. It seems to me it is a matter of simple justice that if on all the facts the court finds that it is not unreasonable or impossible to reinstate that man, and the private employer has refused and thereby violated the provisions of this section by such refusal, the court ought to have the power to reinstate the man and assess as damages the loss of wages he has suffered from the time he applied for reinstatement until the court renders a decision in his favor."

"Did you ever hear of a reinstatement ever being ordered

> The Circuit Court of Appeals for the First Circuit, confronted with the same question, has decided that the compensation provision is not mandatory. *Boston & M. R. R.* v. *Bentubo, supra.* We find it unnecessary to pass upon the issue at this time; for, under the view we take of the case *sub judice, even if the granting of compensation be deemed discretionary, we believe the denial in the instant case was improper.*" (Emphasis ours.)

After citing this case, the opinion in the instant case stated (Tr. 246):

> "Petitioner, while contending that he is entitled to an award of damages as a matter of right, appears to concede the obligation on his part to minimize damages because in his calculations he concedes respondents are entitled to credit for certain amounts which the record shows petitioner earned prior to the entry of the order of restoration. If the court has the discretionary power, as we think it has, to determine the amount of the allowance, *it would seem to follow that it has such power to deny such allowance in toto for good and sufficient cause.* Here, it was because of petitioner's lack of good faith and his deceit and fraud as found by the Master. Under such circumstances we cannot say that the order denying compensation was improper." [Emphasis ours.]

The Court of Appeals clearly erred in its conclusion, whether the words were mandatory or discretionary, *when the damage was conceded.* The court was bound to award the judgment for the damage. The doctrine of "unclean hands" is only applicable to an action in *equity.* It is an *equitable maxim* and is inapplicable to a *statutory proceeding.* Of course, we will later show that there was *no inequitable conduct.* Even if there was inequitable conduct

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by a tribunal of justice that did not also restore the wages that were lost or the damages that were suffered by the applicant who such body had determined ought to be reinstated and restored to his status quo?" 86 Cong. Rec. p. 11703ff.

there is no warrant for the denial of the compensation which is concededly due to the petitioner in the sum of $4,725.00.

In *Loverin* v. *McLaughlin*, 161 Ill. 417, the court said (p. 435):

> " 'When the statute creates a liability, the remedy is invariably at law, unless the statute provides for proceedings in equity.' (*Lane* v. *Nickerson*, 99 Ill. 284; *Wincock* v. *Turpin*, 96 id. 135; *Eames* v. *Doris*, 102 id. 350; *Grund* v. *Tickler*, 5 Kan. 49; *Hill* v. *Frazier*, 22 Pa. St. 320; *Jones* v. *Barlow*, 62 N. Y. 204.)"

The right and the liability having been created by the statute, *the action was not in equity* but in law, and *the equitable doctrines were inapplicable* (*Lantry* v. *Wallace*, 182 U. S. 536, 548). A court of law may *not* refuse to enter judgment for an amount which is not in dispute because of "unclean hands" or lack of good faith. However, we will later show that there is no basis for the alleged bad faith and "unclean hands".

The Act provides (50 U. S. C. A. App. § 308):

> "In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the persons entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action."

It is evident that the meaning of the words "shall have power" referred to *both* (1) restoration, and (2) compensation. If the words employed are *mandatory to restore* the veteran to his position, it necessarily follows that they

are also mandatory *to compensate* him for the loss which is admittedly due him. Assuming that a veteran is entitled under the Act to restoration, no court would be justified to deny him that right, because he "knowingly and wilfully swore falsely" to certain facts, as *these matters would not operate to deny him the right to restoration. The conduct of a witness* during the trial is no reason for denying his right to restoration *if the facts warranted his restoration.* If a witness committed perjury or if he was guilty of misconduct, there are remedies available to the court to punish him, but it would not follow that he would not be entitled to his right to be restored to his position. *The same reasoning applies to the compensation* as to the amount which the Master found was due to the Petitioner.

II.

The Decision on the Former Appeal and the Judgment Entered Pursuant Thereto Constituted Res Judicata on Any Issue Which Was Decided and Which Could Have Been Decided, and the Master Had No Right to Receive Evidence and to Base His Finding on Such Evidence, Contrary to the Matters Which Were Adjudicated on the First Appeal, and the Court of Appeals Erred in Affirming the Judgment Which Adopted the Master's Findings and Conclusions.

At the threshold of the case is the question whether the Master had the right to receive evidence on facts which were adjudicated or which could have been adjudicated on the trial, and which were concluded by the former appeal and the judgment entered pursuant to the opinion. The United States Attorney who acted as counsel for the Petitioner *raised this issue* before the Master at the commencement of the hearing. He urged that the *only issue* before the Master was the amount of damages (Tr. 50-51). The

Master overruled him on that and an exception was noted (Tr. 54). The *right* to the damages was determined by the order of restoration, and the *only* question was whether *any damages were sustained* (Tr. 63). The Master held that he had the right to receive evidence not only on the question of damages but on the *right* to the damages (Tr. 64), and he received the evidence over the objections. Not only did he receive such evidence, but his findings are based on such evidence which he improperly received.

The United States Attorney urged in his objection to the Master's report among other things that (Tr. 215):

> "Master's finding of fact No. 8, with respect to petitioner's demand for reemployment and respondents' offers to reemploy him, particularly with respect to the offer to reemploy petitioner at $7,500.00 per year, has been argued by the respondents in their brief, before the Court of Appeals and in their petition for rehearing. The submission of these questions to the Court of Appeals and the subsequent denial by the Court of Appeals of the contentions so urged by the respondents constitute the law for this case and the Master is without judicial power of any nature or sort soever to tamper with the mandate of the Court 415 of Appeals in this respect. As Judge Minton stated *in passim* concerning the offers of employment:
>
> > 'The petitioner was offered a territory, not his old territory. *He was not offered his old commission of ten per cent* but was offered in one instance seven and one-half per cent to sell "Tumble Twist" rugs in a territory, and in another instance he was offered merchandise, what kind does not appear, in a territory at seven and one-half per cent. *Such offers as to territory and commission do not square with his status and pay before he entered the service and do not satisfy the statute.*'"

He also urged (Tr. 216):

> "In effect, the respondents were seeking, and the Master granted to the respondents, *a retrial of matters heard by the Circuit Court of Appeals.* The respondents cannot obtain a retrial of the contentions and arguments submitted by them to the court of appeals without the express permission of the court of appeals. • • • *Master's finding of fact No. 8,* that the petitioner demanded his former territory and his refusal to accept employment on respondents' terms was apparently not in good faith, but that the petitioner acted in this manner for the purpose of laying a foundation for a future money claim against the respondents, *constitutes a reversal of the mandate and opinion of the Circuit Court of Appeals.*" (Emphasis ours.)

The same objection was urged to the 9th Finding of the Master concerning the alleged lack of good faith. The opinion in the instant case in considering these objections said (Tr. 243):

> "While the question of petitioner's good faith apparently was not raised or discussed in our previous opinion, *we suppose our holding might be construed to find good faith, impliedly at least;* however, we know of no reason why in the instant proceeding the Master, in view of subsequent events, *might not find that he was lacking in good faith from the beginning.*" (Emphasis ours.)

This was *clearly erroneous.*

The case was tried on the merits prior to the first appeal. The issues were made up by the petition (R. 2) and the answer (R. 5).*

The issue of good faith on the part of the Petitioner was *not* raised by the answer, and the *only* issues which it raised were: (1) the alleged lack of jurisdiction, (2) the

* See Record on first appeal on application for the writ of certiorari. (333 U. S. 792.)

alleged failure to state a claim, (3) that Petitioner's position was temporary, (4) that respondents' position had changed, (5) that respondents had offered to reemploy the petitioner, and (6) a general answer which *admitted* that Petitioner made the application on December 18, 1945 for restoration, and that the respondents declined to retore him to the same position and urged that there was no obligation on them to do. The court heard the evidence and *decided on these issues* against Petitioner from which he prosecuted an appeal and was successful in obtaining *a reversal* with directions to change the conclusions of law not inconsistent with the views expressed in the opinion (161 F. 2d 386) and certiorari was denied here (333 U. S. 792). Pursuant to such mandate the court changed its conclusions to the effect (Tr. 29) that defendants have failed and refused to restore the Petitioner to the position held with the defendants prior to the petitioner's entry into the service, and that respondents thereby have *violated* the reemployment provisions of the Selective Training and Service Act of 1940 as amended. It entered judgment on the finding (Tr. 30). No appeal was taken by the respondents from the judgment. *This judgment not only constituted an adjudication as to all matters which were decided but as to all matters which could have been decided* which included the good faith of the Petitioner and all of the other matters which *antedated* the date of the judgment (*Angel* v. *Bullington*, 330 U. S. 183, 186).

Not only was the issue of good faith *not* raised on the former trial and on the former appeal, but it was not even raised by the pleadings on the second trial. The answer of the respondents merely asserted *their own good faith* (Tr. 6) *but did not challenge the good faith of the Petitioner.* On the contrary it *conceded* (Tr. 6) that Petitioner "is now entitled to be restored to the position demanded" and it did *not* urge that he was not entitled

to the position because of lack of good faith. It urged (Tr. 7) that "there was no warrant in law for a money judgment." Even if the evidence, therefore, justified a finding of lack of good faith, *it was not available to the respondents in the absence of raising such a defense by a pleading,* if equitable principles be applied (*Bryant* v. *Lakeside Galleries, Inc.,* 402 Ill. 466, 473; *Swift* v. *Coe,* 102 F. (2) 391; *Schmidtke* v. *Conesea,* 141 F. (2) 634, 635). The issue of "good faith" was *foreclosed* by the judgment and by the *adjudication* on the first appeal. The Master had no right to receive the evidence and to determine that there was a lack of good faith, which he did (Tr. 47). The Court of Appeals which *conceded* that its former opinion implied that there was "good faith" *was also bound by that* opinion.

III.

The Findings of the Master Which Were Adopted by the District Court and by the Court of Appeals Have No Basis in the Evidence Even if He Had a Right to Hear the Matters Which Were Previously Adjudicated, and It Was the Duty of the Court of Appeals to Reverse the Judgment Below.

The Court of Appeals stated in its opinion (Tr. 241):

> "The findings of the Master upon which recovery was denied are vigorously assailed by petitioner in the main upon three grounds, (1) that they are not supported by the evidence, (2) that they are at least in some respects beyond the scope of the mandate issued pursuant to our former opinion, and (3) that in any event the statute imposed a mandatory duty upon the court to award damages. We shall not undertake to detail the evidence heard by the Master. It is sufficient that we have read it and are of the view that it supports the findings."

Not only did the Court of Appeals fail to discuss the "detail" of the evidence, but it did not discuss any of the evidence. It, therefore, becomes necessary to burden this court with a discussion of the evidence in order to show that there is merit in the objections to the Master's report that the findings are *clearly erroneous.*

The Master found (Tr. 43; Finding 8):

> "The petitioner's demanded terms and his refusal to accept reemployment upon the respondents' proffered terms *were apparently not in good faith* but the petitioner acted in the manner that he did with the apparent intention and motive of *laying a foundation for a future claim for money damages* against the respondents."

Not only did the Master have no right to make this finding as this matter was *adjudicated* on the prior appeal and by the judgment entered pursuant to the mandate, but *there was no evidence to sustain this finding.*

At the date when Petitioner made his demand to be restored to his position, on December 18, 1945, *he was not employed anywhere* and he had no prospect for employment. What is the basis for the finding that the demand *at that time* was with the "intention and motive of laying a foundation for a future claim for money damages"? *There is not a word in the record on this point.*

At the date of the demand *there was no possible claim for a money judgment,* as respondents might have complied with the demand and there would have been no basis for a claim for damages, and Petitioner could not have anticipated that respondents would violate the law. If Petitioner had the intention of laying a foundation for a future claim for money damages, he would not have followed his demand with a suit within a month and a half half, but would have waited for a longer period to accumulate the damages. He could not have anticipated that

respondents would succeed below, and that it would be necessary for him to appeal, and that respondents would subsequent to the appeal *delay* by an application here for certiorari (333 U. S. 792) and thereafter further delay the entry of the judgment from October 28, 1947 to December 23, 1947 as respondents did (Tr. 28). *The accumulation of the damages resulted from the wrongful refusal of respondents to comply with the demand, and in violation of the Selective Training and Service Act as found on the prior appeal, and by the court upon the entry of its judgment* (Tr. 29) and *not* from any act of the Petitioner. It is clear, therefore, that *there is no foundation for the 8th finding.*

While a court of appeals must under rule 53 accept the findings of a master which were approved by the trial court as true, if they are not "clearly erroneous," *it is inapplicable to a finding which has no support in the evidence* (*Special Service Co.* v. *Delaney,* 172 F. (2) 16, 19; *Standline & Co.* v. *Sellers,* 174 F (2) 948, 956).

The next finding (Tr. 44; Finding 9) is also faulty for the same reason. The fact that Petitioner wanted to compromise his claim does not justify a finding that he did not act in good faith. The alleged conversation about the settlement is said to have taken place *prior* to the judgment. The conversation was objected to by counsel for the Petitioner who said (Tr. 75) "We cannot at the present time go into any conversation of what took place as a question of evidence before judgment was rendered in this case." The Master overruled the objection, and he permitted the evidence to be received. One of the respondents was permitted to relate a conversation pertaining to a request for settlement of $25,000, *which conversation was objected to* (Tr. 76), and the objection was likewise overruled. The entire evidence about the settlement was *clearly incompetent* (*Arnold* v. *Owens,* 78 F. (2)

495, 497; *Lowenstein* v. *Federal Rubber Co.*, 85 F. (2) 129, 132; *Abel et al.*, v. *Poe*, 199 Ill. App. 391; *Ford* v. *Union Automobile Indemnity Association*, 229 Ill. App. 264, 269), and the master had no right to consider it, *yet he based his finding of lack of good faith on such evidence!* Even if the evidence was competent and admissible, there was nothing in that evidence which should justify the finding of lack of good faith. *A person has the right to seek a compromise of a claim,* and this does not show lack of good faith. This finding was, therefore, *clearly erroneous.* (*McKenzie-Hague Co.* v. *Carbide & Carbon Chemical Corp.*, 73 F. (2) 78, 85.)

The master further found (Tr. 44; Finding 10) that about January 1, 1946, Petitioner stated that he was engaged by Floor Coverings, Inc. to demonstrate and sell floor coverings but would not accept any compensation therefor because he wanted to learn the rug business, *but in truth and in fact the refusal to take compensation was in furtherance of his plan to induce and compel the respondents to make a cash settlement with him,* and that this did not constitute "good faith." The first part of the finding that he did not accept compensation because he wanted to learn the trade which the Master said was untrue, was corroborated by two distinterested witnesses from the Floor Coverings, Inc. (Tr. 177, 183). Their testimony was not contradicted and was binding on the Master. The second part of the finding is based on the testimony of the witness, Logan, to the effect that Petitioner told him he was merely helping out the Floor Coverings, Inc., but he did not want to work for them because he was "afraid it will jeopardize" his "case" (Tr. 156). *At that time there was* no case pending, as the conversation was allegedly held in the first two weeks of January 1946 (Tr. 157) and the case was commenced January 31, 1946. At any rate *there was nothing in that conversation* to justify

the finding that it was "to induce and compel the respondents to make a cash settlement" and that it was not in good faith. The words that *he did not want to "jeopardize his case"* might have been used in the sense that he did not want to jeopardize his case *to be restored to his job* and did *not* involve questions of "settlement" or damages.

When words are open to two constructions, (1) which tend to show good faith and (2) which tend to show bad faith, a court must assume that they were used in the first sense and *not* in the latter sense. (*Chicago R. Co.* v. *Selig Morris et al.*, 203 Ill. App. 449, 454; *Aronson* v. *K. Arakelian Inc.*, 154 F. (2) 231, 233.)

Another witness, Harry Silverstein, testified to an alleged conversation with Petitioner at the same time. He said (Tr. 159):

> "Well, it was my understanding that he was making a connection with this floor covering company and that he was helping them out during the show with the view of connecting with them but that he would have to delay making a definite connection until his case with Berman was settled."

The fair meaning of the word "settled" was the disposition and termination of the case and *not in the sense of a settlement as construed by the Master.* Counsel for the respondents was evidently *not* satisfied with his own proof, and he then attempted *to put the words he wanted in the mouth of the witness* and asked (Tr. 159):

> "Q. I will ask you this, Mr. Silverman, if in those conversations you had with Mr. Levine at that time and at that place, that you have testified about, if Mr. Levine stated this to you or this in substance: That he was helping Mr. Planer sell floor coverings for the Floor Covering, Inc., that he had an opportunity to take a job with Floor Coverings, Inc. at that time to sell rugs, but that he was not taking the job because he was waiting to see what he was to get from Mr.

> Berman. Did he say that to you at that time and place or that in substance?"

An objection was interposed by the United States counsel to the question on the ground that *it put the words into the mouth of the witness.* The Master ruled that the witness may answer "yes" or "no" and the witness said *"I would say that it was in substance, yes."* From the answer of the witness it is clear that the alleged conversation which counsel attempted to prove did *not* take place. This more strikingly appears from the cross-examination of this witness who was asked to tell the court what the conversation was and he said (Tr. 160):

> "Well, yes, the conversation was this in substance: That he had made this connection with Floor Coverings, Inc. and that he was going to help them during the show but that he couldn't go to work for them definitely until his case with Berman was settled, and to my knowledge *that's the sense of the conversation."*

Even if Petitioner had said the words that he wanted to see what he was to get from Mr. Berman, it does *not justify the conclusion* that he wanted to build up a case of damages, and he did not want to get from Mr. Berman the restoration of his job. Only *three weeks* had at that time gone by from the date of the demand, and it was *prior* to the commencement of the suit. There could not have been much damage accumulated at that time. A person has the right to wait for a reasonable time before he takes another position to see the outcome of his demand whether or not he would be restored to his former position, and *there was nothing that was illegal or in bad faith* when he said he wanted to see the outcome of his demand to be restored to his position.

Even in a case where "good faith" or "good cause" is expressly required by the act a person may in "good faith" refuse to take an inferior position because expected to be

called back to his former position within a short time (*American Bridge Co.* v. *Unemployment Comp. Bd. of Revue,* 46 A. (2) 510, 511).

The third witness, Gilford, on whom the master relies, testified to a conversation in January 1946, saying (Tr. 162):

> "Well, at the time—that is, I asked him how come he was connected with Floor Coverings while this show was going on as I understood he was not supposed to be working. Well, he said he is helping them out because he wants to get a job with them as soon as he finds out how his case comes out with Berman."*

There was nothing in that conversation to justify the finding that Petitioner did not act in good faith. *These conversations were denied by the Petitioner* (Tr. 109-110). It is on *this denial* that the master found that *Petitioner was guilty of perjury!* This *finding is clearly erroneous.* Not only was there justification for the denial, but it appears from the testimony of *two disinterested witnesses* who were in a position to know the facts and whose testimony stands uncontradicted, which completely *refutes the finding* as to bad faith and that Petitioner was able to get paid for his employment and get a position, but he did not want it because he was building up a case for damages.

The fact that the petitioner was not hired by Floor Coverings, Inc. to work for it during the Furniture Show, nor that he was employed by it at that time is *uncontrovertedly established by the* witness, Kline, the president of Floor Coverings, Inc. He is the *only* witness in the entire record who could speak with authority on the question of whether or not the petitioner was hired and when he was hired by Floor Coverings, Inc. (Tr. 178, 179). He testified (Tr. 178-179):

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* The falsity of this appears from the fact that Petitioner did not wait for the disposition of his case but accepted a position in July 1946 (Tr. 179).

> "A. There were no promises made of any kind to Mr. Levine. It was completely understood that he was to stay there and learn our lines and when he becomes thoroughly familiar with them we were planning to give him a job as a salesman."

He testified (Tr. 178) that the Floor Coverings, Inc. did *not* pay petitioner any salary during the January show of 1946 and that no one promised to pay him a salary; that petitioner first received commissions from that firm in July 1946 (Tr. 179); that in order to obtain the position from that company it was necessary for petitioner to have an automobile and *without the automobile he could not have obtained the position* (Tr. 180), and the evidence shows that he had no automobile in January 1946.

Another witness, A. B. Planer, who was a salesman for the Floor Coverings, Inc. testified that petitioner assisted him in January 1946 during the furniture show and that no commission was paid to him during the time and that no promise for payment was made to him; that Petitioner never told him that he didn't want to take the position until the outcome of his lawsuit with respondents (Tr. 182). This testimony *refutes* the finding of the master (Tr. 44; Finding 11) that between January 1, 1946 and July 1, 1946 "petitioner was offered *gainful* employment" with Floor Coverings, Inc. as a salesman, but refused such employment in furtherance of his plan to induce and compel respondents to make "a cash settlement" with him, and that "Such action on the part of petitioner was not in good faith." *There is not an iota of evidence* in this record to support this finding, and the evidence of the two disinterested witnesses is to the *contrary.* For the same reason there is no basis for the next finding (Tr. 44; Finding 12) that "petitioner's failure to accept a position from January 1, 1946 to May 1946 was in furtherance of his plan to induce and compel the respondents to make a cash

settlement with him, and that such failure to accept or secure other work during that time was in bad faith."

We challenge counsel for the respondents to refer to the record to justify the basis for this finding.

In the 13th finding the master found (Tr. 45):

> "At the time the petitioner made his application • • • and during all the time between the filing of his petition for reemployment and the entry of the order compelling reemployment, the petitioner did not intend to accept reemployment by the respondents but sought and obtained such order compelling reemployment by the respondents as a basis for his claim of damages against the respondents for their failure to reemploy him on December 18, 1945."

and concluded that petitioner's application "was not made in good faith." The application of the petitioner asked (1) for restoration and (2) for compensation. *There is not a single word in the evidence that at the time when the petition was filed for reemployment, Petitioner did not intend to accept reemployment,* and this finding is *clearly erroneous.* The application which Petitioner filed was for the entry of an order *pursuant to the mandate,* to restate its conclusions of law in conformity with the opinion. The United States attorney who acted for the Petitioner in presenting the application (Tr. 8) said: "We have heretofore filed petition for entry of order on the mandate." It was *he* and *not* the Petitioner who *prepared the order* (Tr. 9) and the question of damages was included in the order which he prepared (Tr. 10). Conceding that Petitioner had a better job at that time and did not want to be restored and only wanted to be compensated for his loss, *he had no alternative but to seek the entry of the order pursuant to the mandate.* When the order was entered the court was advised that Petitioner did not intend to take back his position (Tr. 67). An order for restora-

tion was drawn by counsel for Petitioner pursuant to the directions of the court (Tr. 24) and was brought about by counsel for respondents. At any rate, the fact that during the pendency of the appeal, Petitioner obtained a better job *does not tend to show lack of good faith* on December 18, 1945 when the demand of restoration was made, nor does it show lack of good faith at the time when the petition was filed on January 31, 1946. If the order of restoration had not been obtained *there could not have been a claim for damages,* and it was necessary to enter the order to establish a claim for damages. There is, therefore, clearly no basis for this finding that there was a lack of good faith.

Not only is there no basis for the finding that during all of the time between the filing of his petition for reemployment and the entry of the order compelling the reemployment, Petitioner did not intend to accept reemployment, *but the contrary is shown by the record.* He was unable to obtain a position prior to July 1946 because he had no automobile which was necessary for the position, but in July of 1946 when he purchased an automobile, he accepted the position. If he intended to pile up damages, he would not have accepted the position. The present position was first obtained by Petitioner on June 20, 1947 (Tr. 68). *Petititoner did not have the same position in November 1947* when he filed the application for restoration, but obtained the position *afterwards* (Tr. 70) and even at that time he had to decide whether to be restored to his former position or to keep this position, and he did what any person would do in good faith—*consult his counsel,* the United States Attorney (Tr. 70). The Master did *not* find that the United States Attorney acted in bad faith. It is evident that until November 1947 Petitioner was seeking the restoration to his former position in *good faith,* and when he applied for the restoration order in Novem-

ber 1947, *it was still in good faith* and upon the advice of the United States Attorney.

In answer to the question whether it was not a fact that the reason he refused to return to his job was because he was satisfied with his present position, Petitioner said that that was *not the complete reason* and when asked by the Master to state the complete reason, he said (Tr. 71):

> "I felt that I would be further penalized by returning to Mr. Berman, after the man had fought me for two years, had violated the statute to re-employ me. I had difficulty in securing a position in the rug industry. I finally secured a very fine position. I would have created an injustice to my present employer to suddenly, after the Court ruled on the 23rd, to come back to work with Berman on the 24th, when I received the letter."

In view of the foregoing and in the absence of any other evidence to refute the testimony of Petitioner, there is no basis for the 14th finding that (Tr. 45):

> "and at the time he made his application to the District Court for an order of restoration in November, 1947, and at all times thereafter, did not intend to accept reemployment by the respondents. In November, 1947, petitioner's application to the District Court for an order of restoration was a fraud on the District Court and made for the sole and only purpose of laying a foundation for his claim for money damages against the respondents."

What justification is there for the finding that in November 1947 Petitioner's application "was a fraud on the District Court", and that it was made "for the sole and only purpose of laying a foundation for his claim for money damages"? The only way Petitioner would be entitled to money damages was by the entry of the order of restoration which was the only order which could have been entered under the mandate, as without such order there

could be no money judgment. Why was Petitioner not entitled to do the very act for the purpose of establishing his claim for damages? *He had a legal right to do so, and the finding of fraud is clearly without basis.*

The United States Attorney who acted as the counsel for Petitioner *knew* all of the facts and was *consulted,* and it was *he* who presented the order, and *he did not consider it a fraud upon the court.* He did what the law required him to do, to procure the entry of an order pursuant to the mandate and then move for a money judgment. It was he who thereafter moved for a money judgment, and if he knew that Petitioner committed a fraud on the court and did not give it all of the information, he would not have used his office for such purpose. It must be conceded, therefore, that Petitioner acted in good faith.

There is certainly no justification for the *stigma* on the reputation of Petitioner (as a reward for his service to his country) of "wilfully and knowingly falsely" testifying to material facts which the Master *perpetually stamped on him,* and it was adopted in the published opinion coupled with the words, *"fraud, deceit and bad faith."*

The Master's most dangerous and *harmful finding* was the 17th, that (Tr. 46) Petitioner wilfully and knowingly swore falsely to a material matter in that he denied that he had stated to three witnesses in January 1946 that he had been offered employment, but would not take the position because he was waiting to see how much he could get out of the respondents, and the conclusion of the Master in that finding that this justifies *the complete disregard* of all his uncorroborated testimony, and such action on the part of Petitioner was not in good faith. This finding was adopted by the Court of Appeals. *There is no basis in the record for this finding, and it is clearly erroneous.*

We have discussed above the testimony of the three witnesses (pp. 21-24), and such testimony does *not* sus-

tain the findings. None of these witnesses testified that Petitioner said "he was waiting to see how much he could get out of the respondents." The quotations from the testimony which appear above (pp. 22, 23, 24) *refute this finding.*

Even if Petitioner had denied the statements of the three witnesses, it did not follow that he wilfully and knowingly swore falsely. This finding was unjustified particularly in view of the testimony of two disinterested witnesses who were in a position to know all of the facts *that no such position was ever offered* to the Petitioner as shown above (pp. 24-25) and the fact that Petitioner did accept a job in July 1946 *refutes* the entire story.

The 18th finding of the Master (Tr. 46) that "Petitioner's testimony that he did not refuse employment as a salesman for another floor covering company in January 1946" was contradicted by "three credible and disinterested witnesses" and in so testifying "wilfully and knowingly swore falsely to material facts," *is contrary to the record,* because the substance of the testimony of these witnesses *does not sustain the finding* that Petitioner refused to be employed as a salesman until the dismissal of his Petition of May 8, 1946, and *there is no such evidence in the record.*

The last finding of the Master (Tr. 46) that to allow in whole or in part Petitioner's claim for damages in the sum of $41,696.55 "would be improper, because it is based at least in part on fraud and deceit" and "by perjured testimony" and that this would do violence to legal and equitable principles, and his subsequent conclusion (Tr. 49) that he was not even entitled to the $4,725 which was admittedly due him *cannot be sustained on any proposition of law,* and was *clearly erroneous.*

Even where a witness knowingly testifies falsely to a material issue, his testimony which is corroborated by disinterested witnesses, cannot be disregarded.

In *The People* v. *Pursley,* 302 Ill. 62, the court said (p. 75):

> "The instruction as asked stated the well known rule which has been stated in many cases, that while the jury may entirely disregard the uncorroborated testimony of a witness who has knowingly sworn falsely to any material fact, they have no right to disregard his testimony so far as it is corroborated by other credible evidence but in such case must consider it in connection with the other evidence in the case. (*Chicago and Alton Railroad Co.* v. *Kelly,* 210 Ill. 449; *Bevelot* v. *Lestrade,* 153 id. 625; *City of Sandwich* v. *Dolan,* 141 id. 430; *Johnson* v. *Farrell,* 215 id. 542; *City of Chicago* v. *Ledere,* 274 id. 584.)"

This was reiterated in *The People* v. *Hubbard,* 355 Ill. 196, where the court said (p. 210):

> "The law is, that even if a witness may have testified wilfully and falsely in respect to a matter material to the issues in the case, yet if he is corroborated by other credible evidence or facts and circumstances proved on the trial the jury are not justified in rejecting his evidence in toto. (*Chicago, Ottawa and Peoria Railway Co.* v. *Rausch, supra.*)"

In order to justify a court to disregard the testimony of a witness, it must first appear that such testimony is false and that he wilfully so testified, and even then, it may not disregard the other testimony of the witness if it is corroborated by other testimony. (*In re Estate of Elkerton,* 380 Ill. 304, 403.)

A person does not lose his right to recover the amount which is found by a court to be due him, because he committed perjury during the trial or because he was guilty of other misconduct during the trial. Assuming that Petitioner was guilty of all of the inequities with which the Master charged him, his recommendation to deny him compensation even for the amount which the Master found was due him, cannot be reconciled with the elementary

principles of law. Considering the fact that it was adjudicated on the prior appeal that Petitioner was entitled to be restored to his position and that the respondents were guilty of a violation of the Act, the decision in the instant case which affirmed the judgment of the trial court in denying *any* compensation to the Petitioner is clearly in violation of the spirit of the Act as construed on the former appeal where Mr. Justice Minton, in speaking on behalf of the same court said (161 F. (2) 386, 388):

> "The Supreme Court said in *Fishgold* v. *Sullivan Drydock & Repair Corp., et al.,* 328 U. S. 275, 285, 66 S. Ct. 1105, 1111, 90 L. Ed. 1230, 167 A. L. R. 110:
>
> > 'This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. • • • Our problem is to construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits.'
>
> See also *Kay* v. *General Cable Corporation,* 3 Cir., 144 F. 2d 653; *Grubbs* v. *Ingalls, Iron Works Co.,* D. C. 66 F. Supp. 550, 553."

The decision in the instant case is *irreconcilable* with the decision on the former appeal and the Writ of Certiorari should, therefore, be issued.

Conclusion.

A former employer wrongfully denied re-employment to a returning serviceman. For four years after his honorable discharge, petitioner, the veteran, and respondent, his former employer, have litigated and relitigated the issues involved herein. Respondents are admittedly guilty of a violation of the Selective Training and Service Act but are permitted to escape liability even though they inflicted damage. They lost once in the Court of Appeals,

were denied certiorari, and then as the record will show, successfully relitigated every issue and without justification in the record, convinced the courts below that petitioner acted "apparently not in good faith."

Petitioner was damaged, acted in good faith upon the advice of the United States Attorney and is entitled to recover. The relitigation of the issues herein, after they were once decided, was legally unwarranted. The courts have no discretion to deny damages when injury has been established traceable to the wrongdoing employer. These issues, involving the construction of a statute affecting a great number of honorably discharged veterans, which issues have not heretofore been decided by the Supreme Court, should motivate it to grant this petition for certiorari.

Respectfully submitted,

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 759

ERNEST L. LEVINE,

Petitioner,

vs.

DAVID H. BERMAN AND DOROTHY BERMAN, CO-PARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF DAVID H. BERMAN CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S REPLY.

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THE GUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

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The statement of Respondents (p. 4) that Petitioner testified "that he did not intend to return to his former position with respondents when he applied to the court for an order of restoration" is refuted by their own reference to "(Tr. 66-71)". In answer to the question whether he knew on December 23, 1947 when he made the application for restoration that he was not going to take the job, he answered (Tr. 70):

> "No, I didn't, I did not know anything until after I would review the situation, and talk it over with the United States District Attorneys' office, and then decide."

Even if he intended not to return to his former position subsequent to November 1947, after he obtained a better job, this would not constitute "fraud" or "lack of good faith", as he applied for the restoration on December 18, 1945, and acted in good faith throughout the period when his appeal was pending up to November 1947 when he obtained his new position (Tr. 70). Assuming *arguendo* that petitioner had no intention to return to his former position in December 1947 it was necessary for him to obtain the order of restoration as a *prerequisite* to his right to recover damages. This is *conceded by respondents* when they say (p. 9):

> "Since the power to compensate for lost wages is an incident to restoration, it was incumbent upon the petitioner to secure an order of restoration to support his application for damages."

This *admission cannot be reconciled with the finding* of the Master that because Petitioner did not intend to return to his position his application to the court "was not made in good faith" (Tr. 45: F. 13).

The statement (p. 6) that petitioner told one of the respondents that he would take $25,000 to settle his demands was discussed in the petition (pp. 25-26) and it was shown that *such evidence was clearly incompetent,* and the authorities cited are not disputed by the respondents. It is clear, therefore, that the master's finding of absence of good faith on this ground cannot be sustained as a matter of law.

Respondents rely on the master's finding as to "perjury" and "fraud", "deceit" and lack of "good faith", but *made no attempt to* refer to the record to justify these findings. It appears from the Petition (pp. 26-35) that there is *not an iota of evidence* tending to support such findings. The authorities cited in the petition (p. 25) that the rule that findings of facts of a Master approved by a Court will

not be disturbed is *inapplicable* to findings which have *no support in evidence.*

The assertion (p. 7) that the "various courts of appeals" have "uniformly" held that the words "shall have power" are "discretionary" is *refuted* by the authorities cited in the petition (pp. 15-17). No court has held that a court may, under the power of discretion, deny damages which are found by the court to have been sustained, as shown in our brief (p. 35). There is no answer to the point urged in the petition (p. 35) that under no theory could the court have refused to award damages for the $4,725.00 which was found due Petitioner, even under Respondents' evidence.

The contention (p. 7) that this case presents "the rather simple question" whether the court "abused" its discretion in denying damages to the petitioner is clearly *unsound* and is *refuted* by the "question presented" in the Respondents' answer (p. 2).

It is interesting to note that respondents who cite *Trailmobile Co.* v. *Whirls,* 331 U. S. 40, 91 L. Ed. 1328, on another point failed to notice that in that case this court held that if *res adjudicata* was involved, the court would have *reviewed* the question, and that the questions presented concerning the Act in question was of great importance as to warrant the issuance of the writ.

Respondents quote (p. 7) from the opinion in the *Trailmobile* case that the "action is equitable". They failed to state that their quotation is *not* from the opinion of the court but from the *dissenting* opinion.

The mere statement of respondents (p. 7) that *they "submit"* that the facts found by the master "are amply supported by the evidence" *without any reference to the evidence* is, of course, *meaningless.* The evidence was discussed in the petition (pp. 23-35) and it was shown that the findings as to "fraud", "deceit", "perjury" and "bad

faith" *are not based on any evidence in the case.* No reply is required to the point (pp. 7-8) that "even assuming that the court below misconceived the facts, this is not the type of a question which calls for review by this court."

The contention that the decision on the second appeal is not inconsistent with the decision on the former appeal does not merit a reply as a mere comparison of the two decisions demonstrates the absurdity of the contention.

The decisions which respondents cite (p. 10) on the point that where the evidence is *conflicting* the findings of a Master approved by a court will not be disturbed have no application to the instant case where *the question of conflicting evidence is not involved.* The Writ is sought on the ground that *there is a complete lack of evidence to sustain the findings* to which the objections were filed, and respondents were *unable* to show any basis for the findings, except their own statement.

For the reasons urged in the original petition and in this reply we submit that this court should grant the discretionary Writ of Certiorari to review the decision below.

Respectfully submitted,

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Attorneys for Petitioner.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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OPINIONS BELOW.

The opinion of the Circuit Court of Appeals is reported at 178 F. 2d 440 and appears in the Transcript of the Record at Page 240.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on December 19, 1949 (Tr. 248). No petition for rehearing was filed. The petition for writ of certiorari was filed April 17, 1950. The jurisdiction of this Court is invoked under the Judicial Code (28 U. S. C. A. 1254 (1)).

QUESTIONS PRESENTED.

1. Whether the words "shall have power," as used in Section 308 (e) of the Selective Training and Service Act of 1940 as amended (50 U. S. C. A. App. Sec. 308), are mandatory upon the District Courts of the United States to award damages to a veteran who has been restored to his former position or leave the award of damages in such case to the discretion of the District Court.

2. Whether the findings of the Master, which were adopted by the District Court and by the Court of Appeals, will be again reviewed.

3. Whether the decision of the Circuit Court of Appeals in the first appeal (161 F. 2d 386) ordering the petitioner restored to his former position was *res judicata* of his right to recover damages.

STATUTES INVOLVED.

Section 8 (b) of the Selective Training and Service Act of 1940, C. 720, 54 Stat. 885 (50 U. S. C. A. App. 308 (e)) provides:

> "In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: *Provided,* That no fees or court costs shall be taxed against the person so applying for such benefits."

STATEMENT.

The petitioner, a discharged veteran, originally filed his petition in the District Court praying that the respondents be ordered to restore him to the position he held before his induction in the Army. He was represented by the District Attorney as required by the statute. The District Court dismissed the petition. On appeal the Court of Appeals held that he was entitled to restoration and reversed the decree with directions (*Levine* v. *Berman*, 161 F. 2d 386). After remandment the petitioner applied for an order of restoration and an award of damages allegedly sustained because of the respondents' previous failure to restore him. The petitioner claimed damages in the amount of $52,500.00 which he claimed to be 10% of the gross sale price of all rugs sold in his former territory by the respondents during the period from December 18, 1945, to December 23, 1947 (Tr. 21 and 27). The respondents filed a written answer to this motion and denied, among other things, that the petitioner was entitled to any damages whatsoever from the respondents (Tr. 4). On December 23, 1947, the District Court entered its order directing that the respondents forthwith restore petitioner to his former position and reserved jurisdiction on the question of damages (Tr. 28). The judgment ordered the petitioner restored to his former position with the respondents with the exact terms and conditions and with the same territory he had when he entered the Army. The order was in exact accord with the opinion and mandate of the Court of Appeals. Immediately thereupon respondents offered, as directed, to restore the petitioner, which offer was by him refused. He testified that he had obtained a very fine position with another rug company in the previous June and that he did not intend to return to his former position with respondents when he applied to the Court for an order of restoration (Tr. 67-71).

After the entry of the order of restoration and the refusal of the petitioner to accept re-employment by the respondents, the Court referred the matter to a Master to hear and consider all the issues, whether of law or fact or both, remaining undetermined in the cause and to take testimony and receive evidence if such was necessary to a determination of the issues. The only remaining issue was whether or not the petitioner was entitled to damages and if so, how much (Tr. 30). The Master took evidence and after a full hearing found as a matter of fact and concluded as a matter of law that the petitioner's claim for damages in the exorbitant sum of $41,596.55 was based upon fraud and deceit supported by the petitioner's own perjured testimony and so unconscionable that it should be denied (Tr. 40-49). The District Court adopted the Master's findings and recommendations and entered judgment for the respondents (Tr. 225). On appeal the Court of Appeals concluded that the evidence supported the Master's findings, accepted such findings and affirmed the judgment.

In January, 1941, the petitioner, aged 25, was employed by the respondents in the capacity of a junior salesman to sell retail establishments a line of floor coverings. He was to travel through a territory comprising several States and his compensation consisted of commissions based upon a percentage of respondents' gross sales derived from his territory. He was required to pay his traveling expenses. After fifteen months he left his employment to enter the Army. During his entire fifteen months of employment his total gross commissions were $5,697.43 (Tr. 41). He was discharged from the Army on December 17, 1945, and immediately made application to the respondents for re-employment, demanding his old territory, the same commission rate and all the rugs that he could sell in the territory. At this time the respondents' volume of business had greatly increased and they had three salesmen covering

the territory formerly traveled by petitioner. Respondents offered to re-employ the petitioner as a salesman and allot him enough merchandise to guarantee him a salary of $7,500.00 a year. The petitioner refused all offers of employment except that he be re-employed in his old territory with 10% commission and without allotment. When the respondents refused to do this, petitioner complained to the Selective Service Board and the respondents were called before this Board to consider petitioner's demands. Nothing was accomplished at this meeting and after the meeting the petitioner said to one of the respondents that he would take $25,000.00 to settle his demands (Tr. 76).

During the pendency of his petition for re-employment, the petitioner worked for another rug company as a salesman but denied that he received any compensation for his work (Tr. 106-108). He denied that he had told three disinterested witnesses that he had an opportunity to take a position with the company but would not take the position because he was waiting to see what he could get out of the respondents (Tr. 109). Each of the three disinterested witnesses testified that the petitioner had made such a statement to him (Tr. 155-163). The Master found that the petitioner had testified falsely when he denied that he had these conversations with the three witnesses (Tr. 46). The Master found that the petitioner did not make his application for restoration in good faith but sought an order of restoration as a basis for his claim of damages against the respondents for failure to re-employ him and concluded that the application of the petitioner for compensation was tainted with deceit and bad faith and, under the equitable maxim that he who comes into equity must come with clean hands, the petitioner was not entitled to any relief and recommended that his petition be dismissed. The District Court and the Court of Appeals agreed with the findings and conclusion of the Master.

ARGUMENT.

Contrary to petitioner's contention, there is not involved in this case any unsettled question of federal law. Neither is the decision of the Circuit Court of Appeals in conflict with the decisions of this Court or any other Circuit Court of Appeals on the questions involved.

That actions under the statute in question are equitable in character was determined by this Court in *Trailmobile Co.* v. *Whirls,* 331 U. S. 40, 91 L. Ed. 1328. In that case this Court said:

> "This action is equitable in character and equity traditionally adapts its remedies to the facts as developed by trial rather than to the form of pleadings."

The various Circuit Courts of Appeals and District Courts have uniformly held that the words "shall have power," as used in the statute are discretionary and not mandatory and that Congress intended that any award of damages in these cases to be discretionary with the District Court. *Boston & M. R .R.* v. *Bentubo,* 160 F. 2d 326; *Tsang* v. *Kan,* 173 F. 2d 204; *Doane Co.* v. *Martin,* 164 F. 2d 537; *O'Connor* v. *Yardley Golf Club,* 79 F. Supp. 264; *Flynn, et al.* v. *Ward Leonard Electric Co.,* 84 F. Supp. 399.

This case presents the rather simple question, mainly factual, of whether the Court abused its discretion in denying damages to the petitioner. The Master, the District Court and the Court of Appeals found that petitioner's application for re-employment was not made in good faith and was based on fraud, deceit and supported by his own perjury. We submit that these findings are amply supported by the evidence and there was no abuse of discretion in denying damages. Even assuming that the Court

below misconceived the facts, this is not the type of a question which calls for a review by this Court.

Petitioner contends that the opinion of the Court of Appeals in the first appeal (*Levine* v. *Berman*, 161 F. 2d 386) was *res judicata* on the question of petitioner's good faith and his right to damages. The only question before the Court in that case was whether or not the petitioner should be restored to his former position and the Court of Appeals was of the opinion that he should be and that opinion was complied with. The question of damages was not before the Court and that decision had no hearing on the petitioner's claim to compensation. The decision in that case was based upon conditions as they existed on December 18, 1945. The Master's findings of fact approved by the District Court and the Court of Appeals were based upon conditions existing in December, 1947, after the District Court had fully complied with the mandate of the Court of Appeals on the first appeal. Insofar as those findings relate to the facts as existing at the time of the first trial, they are in accord, supplemented only by subsequent events. There is nothing in the Master's findings of fact at variance with any question of fact determined on the first appeal.

Since the statute affords a returning veteran an action equitable in character, his right to relief is based upon the factual situation as developed by trial. In actions equitable in character, the decree is a determination of the rights of the parties according to equity and good conscience and it is such as the nature of the case, the law and facts demand, not at the time of the inception of the litigation but at the time the decree is entered therein. *Randel* v. *Brown*, 2 How. 406, 43 U. S. 405.

If an employer refuses to comply with the provisions of the Selective Training and Service Act, the act provides

that the District Court *"shall have power * * * to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action."*

The plain meaning of this statute is that District Courts shall have power to award damages as an incident to restoration. Since the power to compensate for lost wages is an incident to restoration, it was incumbent upon the petitioner to secure an order of restoration to support his application for damages. It is clear from the record that petitioner has never made a good faith application for restoration. His sole purpose was to use the law, enacted for the benefit of ex-servicemen, in an effort to force the respondents to pay him a lump sum of money in exchange for his rights to restoration. He admits that he had a better position and did not intend to accept a position with the respondents. This was the situation when he made his application for re-employment, and his petition to the Court for relief that he did not intend to accept, was a fraud upon the Court and an act of bad faith.

The petitioner contends that the decision of the Circuit Court of Appeals in the first appeal was determinative that he was acting in good faith in seeking re-employment. The Circuit Court of Appeals did not so construe its opinion but assuming that the order of re-employment impliedly found that the petitioner made his application in good faith, subsequent events conclusively prove that the petitioner's application for restoration was for the sole purpose of laying his foundation for damages. Since the question of damages was not before the Court of Appeals on the first appeal, the question of good faith was likewise not before that Court. Subsequent events demonstrate that the petitioner was not in good faith, that he was deceitful, fraudu-

lent and untruthful. These factual findings are supported by the evidence and should not be again reviewed.

In the case of *Adamson* v. *Gilliland,* 242 U. S. 350, 353, 61 L. Ed. 356, 357, this Court said:

> "The case is preeminently one for the application of the practical rule that so far as the finding of the Master or Judge who saw the witnesses depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable."

The statute under which the petitioner seeks damages is economic and not penal. The congress intended that the Court should have discretionary power to allow the veteran damages upon the refusal of his employer to reemploy him. Such damages are in the nature of restitution for lost wages and other benefits. Restitution is not of mere right. It is *ex gratia,* resting in the exercise of a sound discretion, and the Court will not order it where the justice of the case does not call for it. (*Atlantic Coast Line R. Co.* v. *Florida,* 295 U. S. 301, 79 L. Ed. 1451.) The grant or denial of restitution as an incident to the main relief is always governed by equitable principles and left to the sound discretion of the Court. *Greenwood County* v. *Duke Power Co.,* 107 F. 2d 484.

In *Boston & M. R. R.* v. *Bentubo,* 160 F. 2d 326, the Circuit Court of Appeals for the Second Circuit, in construing the statute, at Page 328 said:

> "It (Congress) contented itself with a statement of public policy and left the application of its policy to particular situations to the sound discretion of the District Courts. Having done this with respect to the basic right to reemployment itself, we think it probable that Congress also intended to do the same with respect to the incidental rights of the wages lost to a veteran by reason of his former employer's unlawful refusal to rehire." (Parenthetical matters supplied.)

Conclusion.

It is respectfully submitted that the Master, District Court and the Court of Appeals have correctly construed the statute as conferring upon District Courts a discretionary power to allow or deny damages as the circumstances require in each particular case, and that such discretion was soundly exercised in this case. It is also respectfully submitted that the questions presented by the petitioner are not of the type which call for a review by this Court and the petition for writ of certiorari should be denied.

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